90-1474

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

JOHN DAVID McGEE and HANAHAN MOTORS, INC.,

Petitioners,

v.

CRYSTAL G. BROWN,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does South Carolina's procedure for awarding punitive damages violate the Due Process Clause of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Opinion of the South Carolina Supreme Court is December 20, 1990 (see Appendix A). The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specifically set

p or claimed under the Constitution . . .
f . . . the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V:

No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. XIV, § 1:

No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

In February 1988, the Plaintiff filed this tort action in Court of Common Pleas, Charleston County, South Carolina. She sought actual and punitive damages for personal injuries she sustained in an automobile accident which occurred in Charleston County on April 4, 1987 (see Appendix F). The Defendants filed a qualified general denial (see Appendix E). With consent of counsel, the case was transferred to Defendants' home county of Berkeley.

On March 28, 1989 the case was called to trial. At that time the Defendants moved to strike Plaintiff's prayer for punitive damages on the basis that South Carolina's procedures for awarding punitive damages violated the Due Process Clause of the United States and South Carolina Constitutions (see Appendix C). That motion was denied

(see Appendix C). On March 30, 1989 the jury returned a verdict for actual damages in the amount of $67,500.00; it awarded punitive damages in the amount of $100,000.00. (see Appendix B).

Defendants unsuccessfully moved for judgment n.o.v. as to punitive damages (see Appendix C). A timely appeal was then filed in the South Carolina Supreme Court on the grounds that (1) the lower court erred in several evidentiary rulings and, (2) the state's common law procedures for awarding punitive damages denied the Defendants due process (see Appendix D). That Court affirmed the jury verdict (see Appendix A).

FEDERAL QUESTION FACTORS

The Defendants challenged the constitutionality of the State's procedures for awarding punitive damages before the trial of the case began (see Appendix C). The trial court denied the Defendants' motion to strike the prayer for punitive damages and, in essence, held that a "higher" court would have to determine whether or not The State's procedures for awarding such damages were constitutionally infirm. The State Supreme Court declined the challenge apparently on the basis that the Defendant's Motion to the trial court was not sufficiently specific (see Appendix A).[1]

[1] However, the trial court's order (see Appendix C) clearly indicates that its holding was based not on its own view of the motion's merit, but, instead, on its reluctance to sail into unchartered waters. Therefore, there is no reason to believe a more "specific" objection would have yielded a different result.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE FOR WRIT

Petitioner contends South Carolina's procedures for awarding punitive damages violate the Due Process Clause of the United States Constitution in several respects. First, the state requires only that a jury find a defendant's conduct to be reckless, willful, or wanton. *Sample v. Gulf Refining Co.*, 183 S.C. 399, 191 S.E. 209 (1937). This standard is virtually useless as juries are told only that reckless, willful or wanton conduct is that which evidences a conscious disregard for, or indifference to, the rights of others. Secondly, the jury is instructed that if it finds a defendant's conduct to be reckless, it *must* return a verdict for punitive damages. *Sample*, 183 S.C. at 410. (If Plaintiff proves reckless, willful and wonton violation of his rights, the jury has not only the right but the *duty* to award punitive damages). This is contrary to the situation recently presented to this Court in the case of *Pacific Mutual Life Insurance Co. v. Haslip*, 59 U.S.L.W. 4157 (U.S. March 4, 1991) (No. 89-1279) where the jury was instructed that a punitive award was *not* compulsory.

Thirdly, South Carolina's juries are given virtually no limiting criteria in determining the amount of punitive awards. Under existing law, juries are to consider three factors in arriving at punitive awards; those factors are: (1) the character of the tort committed; (2) the punishment to be meted out; and (3) the ability of the wrongdoer to pay. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965). There is no limit on the amount a jury may award. The amount awarded does not have to bear any specific relation to actual damages; in fact, it is "peculiarly within

the judgment and discretion of the jury". *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 180, 314 S.E.2d 354 (1984).

More importantly, the remedies available to a party who is wronged by an excessive punitive award are unsatisfactory and without objective standards of review which are clearly delineated. This, too, is in contrast to Alabama's apparently well developed and elaborate review procedures discussed in *Haslip*. Unlike the "Hammond" test discussed by the Court in *Haslip*, South Carolina's criteria for judicial review of punitive awards is as vague as the standard for determining whether to make an award and, if so, the amount of the award. South Carolina's trial courts may reduce punitive verdicts only if those verdicts are found to be unduly liberal or excessive. *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969). The standard is not defined further. On appeal to the State Supreme Court, the Defendant must meet an even higher, but equally vague, standard. The Defendant must prove that the award is so excessive as to indicate passion, prejudice, caprice, or some other improper consideration. *Id.* Both standards of judicial review are entirely subjective and ill-defined leaving Defendants solely to the "gut-reaction" of the bench.

As this Court recently noted in *Haslip*, 59 U.S.L.W. at 4159, constitutional challenges to punitive awards have frequently been brought to the Court. In *Haslip*, the Court squarely addressed, for the first time, a due process challenge to a punitive award. There, the Court found that Alabama's procedures were constitutional. However, the Court seemed to limit its holding to the facts of that case and seemed to concentrate on critical points which clearly distinguish it from this case. The Court found that

the jury was adequately instructed, that the trial court conducted an adequate post-trial hearing which satisfied the requirements of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986), and finally that the Alabama Supreme Court further ensured due process by again applying the Hammond test, and additional factors set forth in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989). Unfortunately, none of those protections, or protections even closely approximating them, exist in South Carolina to protect John McGee and Hanahan Motors, Inc. from ruinous deprivation and loss of property.[2]

CONCLUSION

The opinions of this Court relating to the constitutionality of punitive damage awards clearly indicate a concern that the procedures by which such awards are

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[2] This point is particularly important and highlights a critical difference between South Carolina's procedures and the procedures in effect in Alabama. In *Hornsby*, 539 So. 2d at 222, J. Houston, writing for the Alabama Supreme Court, recognized that the effect of the punitive award on the defendant, financially, is an important factor to be considered in the court's post-judicial review. ("The defendant's financial position is . . . a consideration essential to a post-judgment critique of a punitive award.") It was the court's position, that punitive awards, if they are to exist at all, "ought to sting . . . [b]ut . . . [not] be large enough to destroy." *Id.* at 222. Unfortunately, the punitive award against these Defendants will destroy them. It has a already forced Hanahan Motors, Inc. into Chapter 11 Bankruptcy; if relief is denied by this Court, the verdict will most probably cause Mr. McGee to declare personal bankruptcy.

made must be fair. ("General concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus". *Haslip*, 59 U.S.L.W. at 4161.) In this case, the jury was given a virtually meaningless standard for determining whether to award punitive damages and, if so, in determining the amount of such an award. Moreover, the petitioners were deprived of any meaningful post-verdict judicial review such as that evidenced in *Haslip*.

This Petition should be granted for the purpose of providing South Carolina juries with standards to constrain their discretion, to help them use their authority wisely and judiciously, and to ensure that citizens of this state such as John McGee and Hanahan Motors, Inc., are not deprived of property without adequate due process of law.

Respectfully submitted,

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October Term, 1990

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Crystal G. Brown,

Respondent,

v.

John David McGee and
Hanahan Motors, Inc.,

Appellants.

Appeal from Berkeley County
William L. Howard, Sr., Judge

Memorandum Opinion No. 90-MO-329
Heard September 26, 1990 – Filed December 20, 1990

AFFIRMED

Thomas J. Keaveny, II, of Holmes & Thomson, of Charleston, for Appellants.

Kenneth W. Thornton, Jr., of Law Offices of Kenneth W. Thornton, Jr., of Georgetown, for Respondent.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23. *See Easler v. Hejaz Temple of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985) (amount of damages award); *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct.App. 1986) (objection must be sufficiently specific to bring into focus precise nature of alleged error).

AFFIRMED.

George T. Gregory, jr. C.J.
David W. Harwell A.J.
A. Lee Chandler A.J.
Ernest A. Finney, Jr. A.J.
Jean H. Toal A.J.

APPENDIX B

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)))	IN THE COURT OF COMMON PLEAS CASE NUMBER 88-CP-08-1056 (Filed 89MAR30) JUDGMENT IN A CIVIL CASE

Crystal G. Brown (Plaintiff(s)) vs John David McGee, Hanahan Motors, Inc. (Defendant(s))

(X) JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.

( ) DECISION BY COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION HAS BEEN RENDERED.

( ) ACTION DISMISSED: ( ) RULE 40(C)(3), ( ) RULE 12(B), ( ) SETTLED ( ) VOLUNTARY NONSUIT ( ) OTHER _____

IT IS ORDERED AND ADJUDGED: ( ) SEE ATTACHED ORDER, ( ) STATEMENT OR JUDGMENT BY COURT.

The jury finds for the Plaintiff against the defendants in the sum of sixty seven thousand five hundred ($67,500.00) dollars, actual damages and one hundred thousand ($100,000.00) dollars, punitive damages.

DATED AT MONCKS CORNER, SOUTH CAROLINA, THIS 30th DAY OF March, 1989.

William L. Howard
JUDGE

THIS JUDGMENT WAS ENTERED ON THE 30 DAY OF MARCH 1989.

AND A COPY MAILED FIRST CLASS THIS 30 DAY OF MARCH 1989.

TO ATTORNEYS OF RECORD OR TO PARTIES (WHEN APPEARING PRO SE) AS FOLLOWS:

Ken Thornton	vs	Thomas J. Keaveny John Austen
ATTORNEY(S) FOR PLAINTIFF(S)		ATTORNEY(S) FOR DEFENDANTS(S)

Annette M. Goodwin
DEPUTY CLERK OF COURT

APPENDIX C

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

HONORABLE WILLIAM L. HOWARD

NINTH JUDICIAL CIRCUIT

CASE NO. 88-CP-08-1056

CRYSTAL G. BROWN,
Plaintiff-Respondent,

vs.

JOHN DAVID McGEE and
HANAHAN MOTORS, INC.,
Defendants-Appllants [sic].

PARTIAL TRANSCRIPT OF RECORD

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APPELLANTS

MOTION OF DEFENSE COUNSEL

THE COURT: You had a couple of motions you wanted to make?

MR. KEAVENY: Yes, sir, Your Honor. In Chambers before we started the case I made a motion to strike punitive damages in the case on the grounds that punitive damages are unconstitutional, in violation of due process, equal protection, and in some cases perhaps unconstitutional on the basis that they might exceed or violate the prohibition against excessive fines.

I understand the Court's position on that, but I did want to put that on the record.

THE COURT: All right, sir, we'll note your objection. I will allow that to go to the jury and if the jury returns punitive damages I will hear you further on that.

At this point I will deny it. Anything else?

POST-TRIAL MOTIONS OF DEFENSE COUNSEL

THE COURT: All right, sir.

MR. AUSTEN: Also, I would move for JNOV on punitive damages.

THE COURT: All right, sir. Let's take them one at a time.

* * *

With regard to the Hundred Thousand Dollar punitive damage figure, as late as 1984 – no, as late as last year – the Court of Appeals has addressed punitive damages in 1984 and they again restated, although in the

minority view, that damages or punitive damages – that where the Plaintiff has proven reckless conduct it is the duty of the jury to vindicate a private right and give punitive damages.

So I do not – I cannot say that based on our voluminous law of punitive damages that punitive damages are unconstitutional. That's just an issue that is going to have to – if that is to be addressed again in South Carolina, that is going to have to be addressed at a higher level.

A Hundred Thousand Dollars is less than one third of his admitted net worth. Here again, I've got to take the evidence in the light most favorable to the Plaintiff in deciding this motion.

I cannot say that to punish someone by taking away less than one third of their net worth, where they are going ninety-five or a hundred miles an hour down a four lane highway at eight thirty on a Saturday Morning under the influence of alcohol after staying up all night, after knowledge they are under medication from a doctor who has told them not to mix it with alcohol because to do so would cause an inability to react properly, or that mixing it with alcohol would – at least the symptoms of alcohol – I just cannot say that that [sic] is an outlandish verdict or one that is based upon caprice, passion or sympathy as opposed to those items which I told them to consider; that is, the nature of the wrong, the amount of punishment which should be given, and the abilit[*sic*] of a Defendant to pay.

I think that if you take it in light most favorable to the Plaintiff, with that kind of speed and that kind of condition, that that is proper.

So I'm going to have to deny your motions on that basis.

Sitting as a thirteenth juror, I cannot grant it.

APPENDIX D

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM

HONORABLE WILLIAM L. HOWARD

NINTH JUDICIAL CIRCUIT

CASE NO. 88-CP-08-1056

CRYSTAL G. BROWN,
Plaintiff-Respondent,

vs.

JOHN DAVID McGEE and
HANAHAN MOTORS, INC.,
Defendants-Appellants.

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DOES SOUTH CAROLINA'S PROCEDURE FOR AWARDING PUNITIVE DAMAGES VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND THE SOUTH CAROLINA CONSTITUTION? 13

STATEMENT

At approximately 8:30 a.m. on Saturday, April 4, 1987, John McGee, owner of Co-Appellant Hanahan Motors, Inc., was on his way home from a friend's house where he and other friends had spent the night playing cards in Mount Pleasant. That house was near the intersection of Highway 17 and Highway 41 in Charleston County, approximately six miles from the scene of this accident. As he approached the intersection he was traveling approximately 55 miles per hour. (Tr., p. 136). He realized the light controlling traffic was red and a car was stopped ahead of him. He applied his brakes but was unable to stop before striking the Respondent's vehicle. The collision caused the Respondent's vehicle to come to rest upside down in the intersection. Mr. McGee's vehicle also came to rest in the intersection.

Fortunately, the parties did not sustain serious injuries. Mr. McGee's head struck and broke the windshield. The Respondent sustained a hairline fracture of the transverse process of the fourth lumbar vertebrae. She stayed in the hospital that day and the next for observation. (Tr., p. 107). She then returned home to Georgetown. From that point she was seen by Dr. Brilliant, a Charleston orthopaedist, a total of six times. (Tr. p. 114). Her last visit to Dr. Brilliant was August 20, 1987. She did not see

another physician for neck or back problems until January 1988, when she was seen by Dr. Ahearn in Georgetown. He prescribed approximately three weeks of physical therapy which the Respondent received the following month. The second and last visit to Dr. Ahearn occurred May 18, 1988. (Tr., p. 63). She did not receive any additional treatment prior to trial.

With the exception of the physical therapy prescribed by Dr. Ahearn, "to see if she could be helped" (Tr., p. 61), Respondent's physicians did nothing more than monitor her self-healing process. She never suffered any casts, bandages, stitches, or injections (Tr., pp. 71-74). Her medical bills were extremely limited and totaled only $3,543.40. More than half of those charges ($1,829.50) were from Dr. Ahearn, the Georgetown Memorial Hospital physical therapy department, and Georgetown Radiology. Those were all incurred almost a year after the accident. Despite the fact he believed Respondent would have "good days and bad days" (Tr., p. 47), Dr. Ahearn could not provide an opinion as to the nature of frequency of the future medical care Respondent would need. (Tr., p. 50).

At trial Appellants stipulated Mr. McGee was negligent in striking the Respondent's vehicle. They did not stipulate to gross negligence or to proximate cause.

It is clear from the record and the jury's verdict that Respondent's counsel preyed upon the jury's emotions and took advantage of every opportunity to prejudice the jury against the Appellant; all this in an effort to "ring the bells" with a total verdict (actual and punitive) which, if affirmed, will cause Mr. McGee, a 56 year old business

man who has worked hard all his life, to declare personal bankruptcy. (It has already forced his business into bankruptcy).

ARGUMENT I

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS A NEW TRIAL ABSOLUTE ON THE BASIS THAT THE VERDICT WAS THE RESULT OF PASSION, PREJUDICE, CAPRICE, OR OTHERWISE UNSUPPORTED BY THE EVIDENCE. (EXCEPTIONS I, II, IV, V, VI AND IX).

The jury's award of $67,500 actual damages and $100,000 punitive damages is excessive. It is not supported by the evidence and is the result of passion, prejudice, caprice, or other improper considerations.

This Court's standard of review is, admittedly, limited. If a verdict is supported by any rational view of the evidence, it will not be disturbed. *King v. Daniel Intern. Corp*, 278 S.C. 350, 296 S.E.2d 335 (1982). But if it appears that the verdict is shockingly disproportionate to the plaintiffs' injuries, the Court has not only the right, but the duty to set it aside. *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969).

In *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108, appeal dismissed 286 S.C. 127, 332 S.E.2d 102 (Ct. App. 1985), the Court affirmed a verdict of $100,000 actual damages where the plaintiff provided evidence of almost $13,500 in medical expenses. There the Plaintiff was crushed by a tobacco bin which fell due to a defective lifting mechanism. He suffered excruciating pain immediately and was

expected to endure pain daily for the rest of his life; he was not expected ever to walk without assistance.

In *Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986), the Court affirmed an actual damage award of $75,000. As in *Madden*, the Plaintiff's damages were severe. There, the Plaintiff was severely beaten, suffered an orbital blow-out to one eye, was hospitalized for six days, underwent surgery, suffered multiple bruises, experienced double-vision, and was left with numbness in one check which was expected to be permanent. The Court acknowledged that the verdict was "substantial," but concluded it was not the result of passion, prejudice, or caprice in light of evidence of substantial injury.

The award of actual damages in this case is not supported by any rational view of the evidence. While the verdict closely approximates those of *Madden* and *Crittenden*, the Respondent's injuries and damages pale in comparison. Here, the Respondent was hospitalized two days for observation. She did not undergo surgery, had no bandages applied, no stitches sewn, no injections administered. She was not subjected to any traction of any kind, and did not receive any sort of physical therapy. (Tr., pp. 71-72). She was released from the hospital without medical appliance. (Tr., pp. 72-73). Thereafter, she saw Dr. Brilliant only six times. (Tr., p. 30). Within three weeks of the accident (April 14, 1987) Dr. Brilliant recommended that she "get up and move around." (Tr., p. 109). By May 18, 1987, a little more than thirty days after the accident, she had good range of motion and was instructed only to avoid "strenuous activity." (Tr., p. 112). She was not on any medication. (Tr., p. 113).

Respondent continued to progress without any apparent setbacks. On June 9, 1987, a little more than two months after the accident, she had good, probably almost normal, range of motion and complained only that her back occasionally bothered her. (Tr., p. 113).

Respondent last saw Dr. Brilliant on August 20, 1987 and did not receive additional medical treatment for problems directly relating to this accident until January 1988. At that point, she saw Dr. A. Mason Ahearn. Dr. Ahearn saw her only once in January and once in May. (Tr., p. 45). His treatment was limited to a recommendation of physical therapy. He did not find any objective problems, prescribed no medical appliances, no prescription medications, and did not refer the Respondent for a second opinion or further evaluation.

Dr. Brilliant did not assign any permanency to the Respondent and Dr. Ahearn, after seeing the Respondent only twice, testified at trial in March 1989 only that Respondent would have "good days and bad days." (Tr., pp. 47-48). Nevertheless, there was no evidence of additional medical visits after those with Dr. Ahearn the year before.

With the exception of the fourteen physical therapy sessions Respondent received in February 1988, her medical care was limited entirely to observation. Neither Dr. Brilliant nor Dr. Ahearn ever administered any sort of "hands on" treatment and there was no testimony she received any treatment after her last physical therapy session in February 1988.

Respondent's total medical expenses were as follows:

Emergency Medical Services (4/4/87)	$ 95.00
East Cooper Hospital (4/4/87)	1,141.51
Diagnostic Radiology (4/4/87)	98.00
Roper Emergency Room (8/26/87)	73.25
Roper Radiology (8/29/87)	50.00
Dr. Brilliant (4/4/87 - 8/20/87)	323.00
Dr. Ahearn (1/27/88 - 5/18/87)	297.00
Georgetown Memorial Hospital (2/4/88 - 2/25/88)	1,318.00
Georgetown Radiology (2/4/88)	116.00
Prescriptions	31.14
Total	$3,452.90

The actual damages award of $67,500 (almost twenty times the medicals) is clearly not supported by the testimony adduced at trial.

The punitive damage award is excessive as well. It, too, must be set aside as the result of improper consideration. In determining punitive damages, the jury is to consider three factors: (1) the character of the tort; (2) the punishment to be meted out; and (3) the defendant's wealth. *Albertini v. Veal*, 292 S.C. 561, 357 S.E.2d 716 (Ct. App. 1987). Taken together, the total verdict of $167,500 is just under one-half the Appellant's net worth and vastly beyond his ability to pay. The punitive award alone is nearly one-third of his wealth.

Several events occurred during the trial which explain these excessive awards and which support the Appellant's contention that throughout the trial Respondent's counsel attempted to inflame the jury and appealed to its emotions. While none of them taken alone may have been enough to prejudice the jury, in combination they could have no other effect.

First, the Court denied Appellants' Motion in Limine to exclude irrelevant evidence that Mr. McGee had played poker the night before this accident. Evidence is not admissible unless it establishes, or makes more or less probable, some issue presented and bears directly or indirectly on that issue. *Francis v. Mauldin*, 215 S.C. 374, 55 S.E.2d 337 (1949). Assuming the evidence is relevant, it should nevertheless be excluded if the risk of prejudice outweighs its probative value. *State v. Hiott*, 276 S.C. 72, 276 S.E.2d 163 (1981).

Evidence that Mr. McGee was returning home from an all night poker game was not relevant to any issue in the case. It did not tend to prove, or make more or less probable, any issue. Furthermore, any probative value was clearly outweighed by its prejudicial effect. In *U.S. v. St. Michael's Credit Union*, 880 F.2d 579 (1st Cir. 1989), the Court recognized the prejudicial affect of this type of testimony. There, the First Circuit Court of Appeals vacated judgment for the U.S. because, among other errors, the lower court admitted into evidence testimony of gambling by a defendant's father. In that case, Janice Sacharczyk was charged with a number of criminal violations connected with her employment at St. Michael's Credit Union. The government took the position that the father's gambling activities were relevant to its case

against Ms. Sacharczyk because, at times, her father used the bank's resources to conduct business. The prosecution expected to show by inference that the defendant knew or must have known of his activities and for that reason she failed to comply with certain IRS filing requirements. The Court of Appeals was not convinced that the evidence was sufficient to support an inference that the defendant knew of her father's gambling. It held that without some connection between the defendant's activities and her father's gambling, the testimony was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice. *Id.* at 601.

Evidence which is "unfairly prejudicial" has been defined as evidence which "might cause a jury to base its decision on something other than the established propositions in the case." *Id.* at 601, citing J. Weinstein & M. Berger, *Weinstein's Evidence*, § 403[3] at 403-39 (1988). In South Carolina, gambling is illegal. S.C. Code Ann. § 16-19-40 (1976 Law. Co-Op.) This alone may have served as sufficient basis for some jurors to "punish" Mr. McGee. Moreover, its admission violated a more fundamental prohibition against introducing evidence of other crimes. In *State v. Chasteen*, 231 S.C. 141, 97 S.E.2d 517 (1957), the Supreme Court of South Carolina held that evidence of other crimes is not admissible unless (1) the witness has been convicted of it, and (2) it is a crime of moral turpitude. (An exception exists if the crime is one which must be proven to establish the crime charged. *See State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987); *State v. Green*, 261 S.C. 366, 200 S.E.2d 74 (1973)).

The purpose behind limiting the introduction of this type of evidence was eloquently stated by Justice Marion in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923):

> The objections . . . to the admission of this class of evidence are patent. Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of a belief in the prosecution's [in this case, the Respondent's] theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner [the defendant] guilty. . . .

Id., at 416.

The same is true in this case. Although Respondent's action is civil in nature, punitive awards are designed to punish and deter. In that sense, actions seeking punitive damages are quasi-criminal in nature. Admitting into evidence testimony that Mr. McGee had been playing poker the night before this accident allowed the jury to consider a matter which was completely irrelevant to any issue in the case and only predisposed jurors to believe he drank liquor all night.

The prejudice was furthered by the speculative testimony of Ms. Wallace. Her testimony regarding Mr. McGee's speed was improperly elicited through leading questions. While it is well settled that a witness may provide testimony as to the speed of a vehicle, that testimony cannot be without basis. *Lynch v. Pee Dee Express*, 204 S.C. 537, 30 S.E.2d 449 (1944). A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Society, Inc.*, 681 F.2d 930 (4th Cir. 1982). The fact that Ms. Wallace saw appellant's vehicle in her rearview mirror and only for a second indicates she had no basis for

judging Mr. McGee's speed. (Tr., pp. 17-18). Her testimony on direct also makes it clear she had no opinion as to the speed of Mr. McGee's car. When asked how fast he was traveling, she said only that he was "flying." (Tr., pp. 14-15). But in a sequence of questions reminiscent of an auction, Respondent's counsel succeeded in getting Ms. Wallace improperly to speculate Appellant was traveling a hundred miles an hour.

In keeping with this plan to prejudice the jury, Respondent's counsel succeeded in admitting into evidence Dr. Brilliant's deposition testimony about procedures followed in assessing permanent impairment, even though there was no evidence of permanent impairment to Respondent. (Tr., pp. 123-127). As indicated above, absent a showing that evidence is relevant to some matter in issue, the Court should not admit it. *Francis, supra.* The testimony of Dr. Brilliant served only to prejudice and confuse the jury. It allowed the jury to make its own determination of impairment despite a complete lack of evidence of the same.

The fourth event which was highly prejudicial to the Appellant occurred in Respondent's closing argument. It is there her counsel used the earlier testimony of gambling most invidiously; he argued:

> Mr. McGee sees this as a high stakes poker game. He's sitting there with a pile of money. He's got Three Hundred and Fifty Thousand Dollars but he doesn't have any cards, but he's [sic] sitting here, coming in here trying to bluff . . . all of us, and if he expects me to believe . . . what he purports to be the truth in

> this case he is insulting my intelligence. He doesn't have the cards to play.

(Tr., pp. 142-143).

This closing argument demonstrates Appellants' earlier points regarding the prejudicial nature of the evidence. But it goes beyond that and demeans and belittles Appellants' right to a jury trial. Respondent's counsel should not be allowed to assail that right any more than the solicitor was allowed to in *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). There, the solicitor, in his closing argument, referred to the defendant's apparent lack of remorse over the victim's death. On appeal the Court held the remarks constituted an improper comment upon the defendant's constitutional rights. It is irreconcilable, the Court stated, for an accused to plead not guilty and "simultaneously express remorse for acts he denied committing." *Id.*, 293 S.C. at 324. "When an accused asserts a constitutional right, it is impermissible for the state to comment upon or argue in favor of guilt or punishment based upon his assertion of that right." *Id.*, 293 S.C. at 323.

The same should be true in a civil context where a party denies an allegation (here intoxication) and puts the plaintiff to her burden of proof. In this case, Respondent's counsel implies Mr. McGee *knows* he is guilty of intoxication, and in lying to the jury tries to use the system in a last-ditch gamble to avoid culpability.

At a minimum, the statement is intended to invoke the passion and prejudice of the jury against the Appellant for asserting their constitutional right to a trial by jury. It violates the rule stated in *Gathers v. Harris Teeter*

Supermarket, Inc., 282 S.C. 220, 231, 317 S.E.2d 748, 749 (1984) that "[i]n a closing argument to the jury an attorney may not make such remarks which are unfairly calculated to arouse passion or prejudice. *See also Continental Cas. Co. v. Wilson-Avery, Inc.*, 115 Ga. App. 793, 156 S.E.2d 152, 156 (1967) ("remarks of counsel amount to misconduct and may require corrective action or mistrial even where the remarks are in some way related to the evidence if the argument is unfairly calculated to arouse passion or prejudice"). The remarks of Respondent's counsel could have had no purpose other than to arouse the passion of the jury.

Finally, after deliberating for hours, the jury returned with three questions. They were:

(1) Are we allowed to ask if damages we award, if any, are going to be paid by an insurance company.

(2) If so, are punitive damages, if any, covered under liability.

(3) What does the Three Hundred Fifty Thousand Dollars include.

(Tr. App., p. 6). The Court refused to allow the Appellant to explain his net worth at trial, and refused to allow him to do so after the jury's question. Instead, the Court merely repeated its punitive damages instruction. Within minutes, the jury returned the verdict which is the subject of this appeal.

While any one of the many prejudicial events taken alone might amount only to harmless error, taken together they deprived the Appellants of a fair trial. In light of the prejudicial events discussed above, the

Respondent's limited actual damages, and the enormity of the verdict relative to the Appellants' ability to pay, the Court should set aside the verdicts for actual and punitive damages on the basis that both were the result of passion, prejudice, caprice or other improper considerations.

ARGUMENT II

SOUTH CAROLINA'S PROCEDURE FOR AWARDING PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION AND THE SOUTH CAROLINA CONSTITUTION. (EXCEPTIONS VIII AND IX).

Both the South Carolina Constitution and the United States Constitution guarantee citizens of this state due process of law. Specifically, Article I, Section 3 of the South Carolina Constitution provides that no citizen of the state shall be "deprived of life, liberty, or property without due process of law. . . . " Article V of the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . . " Article XIV, Section 1 of the United States Constitution reinforces Article V and makes it applicable to the states. It provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law. . . . "

The United States Supreme Court has given increasing attention to the constitutionality of state procedures for awarding punitive damages. In *Smith v. Wade*, 461 U.S. 30 (1983), then Associate Judge Rehnquist, in a dissenting opinion in which Chief Justice Burger and Justice Powell

joined, roundly criticized the procedures by which punitive damages are often awarded. He noted that although punitive awards are "quasi-criminal, their imposition is unaccompanied by the type of safeguard present in criminal proceedings" and went on to write that juries may "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.* at 59 (citations omitted).

More recently, the Court recognized that due process challenges to state punitive damages awards "raise important issues which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828-29 (1986). In *Bankers Life & Cas. Co. v. Crenshaw,* 100 L.Ed.2d 62, 78 (1988) (O'Connor & Scalia, J.J., concurring), two members of the Court recognized that state laws which allow juries "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state 'may' violate the Due Process Clause of the United States Constitution." *See generally,* Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va. L. Rev. 139 (1986); 37 Vanderbilt L. Rev. 1117 (1984); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedure,* 69 Va. L. Rev. 269 (1983); *The Imposition of Punishment By Civil Courts: A Reappraisal of Punitive Damages,* 41 N.Y.U. L. Rev. 1158 (1966).

South Carolina's procedures for awarding punitive damages violate the procedural due process guarantees of the South Carolina Constitution and United States Constitution in several respects. First, juries are left with complete discretion whether to award punitive damages. They are instructed simply that if they find the Appellant's conduct was grossly negligent, reckless, willful or

wanton, they may award punitive damages. *Sample v. Gulf Refining Co.*, 183 S.C. 399, 191 S.E. 209 (1937). The standard is so vague that members of the judiciary themselves may not recognize behavior that subjects a party to punitive exposure. In *Payne v. Bouharoun*, 292 S.C. 390, 356 S.E.2d 438 (Ct. App. 1987), for example, the trial judge, sitting without a jury, awarded only actual damages to a plaintiff who had been physically thrown out of the defendant's bar. The lower court did not address the plaintiff's prayer for punitive damages and the plaintiff appealed. Reviewing the matter, the Court of Appeals found the defendant's actions gave rise to a possible punitive award and remanded the case for hearing on punitive damages.

Second, South Carolina common law does not specify with sufficient detail the manner in which juries are to determine the amount of punitive awards. Under existing law, the jury is to consider three factors: (1) the character of the tort committed; (2) the punishment to be meted out; and (3) the ability of the wrongdoer to pay. *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965). Virtually no limitations are imposed upon the jury. The punitive award does not have to bear any specific relation to actual damages. In fact, in *Mylin v. Allen-White Pontiac, Inc.*, 281 S.C. 174, 180, 314 S.E.2d 354, ___ (1984), the Court of Appeals held that the amount awarded "is peculiarly within the judgment and discretion of the jury." The *Hicks* standard is virtually identical to the standard criticized by the Supreme Court in *BFI v. Kelco*, 109 S.Ct. 2909, 2923 (1989) (Brennan, J. and Marshall, J. concurring). In *Bankers Life, supra*, the Supreme Court criticized a Mississippi standard similar to *Mylin*. After noting that

the State Supreme Court affirmed the punitive award by recognizing that the amount of the award was committed solely to the authority and discretion of the jury, the Court wrote "[t]his grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process." *Id.* at 78 (O'Connor, J. and Scalia, J. concurring).

Third, left to its own discretion, the jury could return a verdict which would prove ruinous to a defendant. This is precisely what occurred in *Albertini v. Veal*, 292 S.C. 561, 357 S.E.2d 716 (Ct. App. 1987). There the jury returned a punitive award which exceeded the defendant's net worth. Virtually the same consequences appear in this appeal. Although the Appellant stipulated to his net worth, he sought to explain the composition of that net worth for the jury. In fact, the jury sought that information but the Court refused to permit testimony regarding it. While the Appellant had *some* insurance, it was very limited (approximately $39,000 in coverage remained at the time of trial). If the verdict in this case is permitted to stand, Mr. McGee will be personally responsible for more the 75% of the verdict.

Under existing law, the only limitation on the jury's unbridled discretion to award punitives rests with the trial judge and the appellate court. The trial judge may reduce a punitive verdict if it is unduly liberal or excessive. The appellate court may reduce a punitive verdict only if the award is so excessive as to indicate it is the result of passion, prejudice, caprice, or some other improper consideration. *Mylin, supra.* Even then, no objective criteria for review exists.

Fourth, despite the fact that punitive awards cause the Appellant substantial property deprivation (in this case, approximately one-third of his stipulated net worth), the state does not require proof beyond a reasonable doubt or even by clear and convincing evidence as required in other states. *Compare,* Colo. Rev. Stat. § 13-25-127(2) (1987) (beyond a reasonable doubt); Cal. Civ. Code § 3294(2) (Deering Supp. 1988) (clear and convincing); Or. Rev. Stat. § 30925 (1988) (same); *Linthicum v. Nationwide Life Ins. Co.,* 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986) (same).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments." *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976). The right to a hearing prior to suffering loss of property is well recognized. *Id.* at 333; *Wolf v. McDonnell,* 418 U.S. 839 (1974). The Appellants in this case ask the Court to review South Carolina's current procedures for determining whether punitive damages should be awarded and, if so, in what amount.

In *Mathews, supra,* the Supreme Court set forth the factors which should be reviewed in determining the constitutional adequacy of a challenged procedure. These factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal

> and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (citation omitted). South Carolina's current procedure for awarding punitive damages is constitutionally infirm given the seriousness of the private interest that can be affected, the risk of erroneous and sometimes ruinous deprivation, the probable value of additional or substitute procedural safeguards, and the limited burden upon the government of additional or substitute requirements.

The private interest which is affected in this case is obvious: Mr. McGee's estate. The jury is specifically instructed to take into consideration the defendant's wealth, the fruits of a lifetime of hard work. If this verdict is allowed to stand Mr. McGee will lose, in punitive damages alone, nearly one-third of the estate which he has accumulated during his life. This is a very substantial interest made even more significant by the fact that he is at that point in life when people begin to slow down and prepare for retirement.

The second factor to be considered under *Mathews* is the risk of erroneous deprivation under existing procedures and the probable value of additional or substitute safeguards. The procedures for awarding punitive damages to be imposed unnecessarily and unfairly increases the risk of erroneous punitive awards. First, the present evidentiary standard (preponderance of evidence) contributes to the risk of an erroneous result. Because the evidence need only preponderate in favor of a prevailing party, the jury is free to resolve substantial doubts regarding the Appellants' conduct and intent in favor of the

Respondent. This discretion combined with the imprecision in the substantive standard for awarding punitive damages maximizes the risk that jurors will apply their prejudices and subjective values to the decision and punish a defendant when no punishment is appropriate. The Supreme Court has held that "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge" mitigate strongly in favor of an evidentiary standard that is stricter than mere preponderance of the evidence. *Santosky v. Kramer,* 455 U.S. 745, 762 (1982).

Second, as earlier noted, the risk of error is compounded by the law's failure to state clearly when and under what circumstances a jury may inflict punishment. The law does not tell juries what factors may or must, or what factors must not, be considered in deciding whether to inflict punishment. The law gives no guidance concerning *any* limiting principles dictated by the purposes of punitive damages. If the jury were to divine that the purpose is to deter similar future conduct, the lay jurors, with none of the sentencing expertise or experience of judges, would have to speculate as to the manner in which proper deterrence should be achieved. If the jury were to divine that the purpose is to punish, the lay jurors would have to speculate as to retributive principles. And, of course, the jury being unguided, would most likely simply vent its spleen with no principled theory of punitive damages in mind.

The punitive award also far exceeds *any* monetary fine the state could have imposed upon Mr. McGee had he been convicted of DUI in a criminal court. S.C. Code

Ann. § 56-5-2940 (1988 Supp.) sets forth the current penalties for driving while intoxicated. These fines range from a *possible* fine of two hundred dollars for a first offense, which this would have been had Mr. McGee been convicted criminally, to a maximum fine of six thousand dollars for a third offense. Accordingly, in this case the punitive award is approximately seventeen times greater than the maximum fine the state could have imposed if Mr. McGee had been charged and convicted of DUI, third. It is five hundred times larger than the fine any South Carolina court can currently impose for DUI, first.

Because the process by which a jury decides whether, and in what amount, to award punitive damages substantially increases the risk of erroneous fact finding as compared with other civil proceedings, enhanced procedural protection is required. *See Santoksy v. Kramer, supra* (due process requires enhanced protections against erroneous fact-findings in proceedings to terminate parental rights). Furthermore, because the law fails to set standards for when and in what amount punitive awards may be inflicted, and because these omissions expose defendants to each jury's subjective values and individuous discrimination, procedural safeguards are needed to protect against errors resulting from the virtually unrestrained discretion of the jury. *See Santosky,* [sic] at 762, 763 (proceedings in which the fact finder has "unusual discretion" to weigh facts are "often vulnerable to judgments based on cultural or class bias"); *Smith,* 461 U.S. at 60 (the absence of procedural safeguards in punitive damages cases exposes defendants to the "caprice and prejudice" of the jury) (Rehnquist, J. dissenting).

The third and final consideration articulated by the *Mathews* Court is the state's interest, which should include the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. Modifying the existing procedures by which punitive damages are awarded under South Carolina law would not increase fiscal or administrative burdens on the state or the court system because these changes focus primarily on the rules under which punitive damages are determined. Increasing the plaintiff's burden of proof and more clearly defining the standard for punitive awards will expedite trials and promote settlement by replacing vague and uncertain standards with more concrete guidelines and procedures which parties can use in evaluating cases. These procedures may also reduce the number of appeals and simplify appellate review because they will provide more meaningful standards. The Court will no longer be required to resort to vague standards such as whether or not the punitive award shocks the conscience. *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963).

Moreover, no significant governmental interest weighs heavily against reform. Punitive damage awards that exceed the proper levels of punishment and deterrence cannot be justified. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), the Supreme Court held that "states have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." A properly structured procedure for imposing punitive damages would advance the state interest in punitive damages awards because it would guard against over deterrence and excessive

punishment. The risk of over deterrence is great under the current procedure because plaintiffs and their attorneys possess strong incentives to seek excessive awards. *See*, Wheeler, 69 Va. L. Rev. at 307. Moreover, excessive verdicts receive apparent sanction from a system that encourages juries to consider the wealth of the defendant in determining the proper measure of punitive damages.

CONCLUSION

The Appellants have demonstrated that the enormity of the actual damage award relative to the Respondent's injuries were the result of improper considerations. They have also demonstrated that the magnitude of the punitive award relative to Mr. McGee's net worth is unjustified, ruinous, and the result of improper considerations. Finally, it is evident, given the recent opinions of the United States Supreme Court, that South Carolina's current procedures for assessing punitive damages are unconstitutional. For these reasons the jury's verdict must be set aside.

/s/ Keating L. Simons, III
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ATTORNEYS FOR APPELLANTS

CHARLESTON, S.C.

March 16, 1990

APPENDIX E

STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON) CRYSTAL G. BROWN,) Plaintiff,) vs.) JOHN DAVID McGEE and) HANAHAN MOTORS, INC.,) Defendants.)	IN THE COURT OF COMMON PLEAS Case No. 88-CP-10-730 ANSWER

The Defendants, above-named, answering the Complaint of the Plaintiff herein, allege and say that:

FIRST: They deny each and every allegation of the Complaint not hereinafter specifically admitted, modified, or explained.

AS TO THE FIRST CAUSE OF ACTION

SECOND: The Defendant McGee admits so much of Paragraph 1 as alleges he is a resident of Berkeley County, State of South Carolina; they admit, upon information and belief, that the Plaintiff is a citizen and resident of Georgetown County.

THIRD: They admit the allegations of Paragraphs 2 and 3.

FOURTH: They admit so much of Paragraph 4 as alleges on or about April 4, 1987, at approximately 8:30 a.m. a collision occurred between the vehicles driven by the Plaintiff and the Defendant McGee on U.S. Highway 17 North By-Pass; they deny the remaining allegations of said Paragraph and demand strict proof thereof.

FIFTH: They deny the allegations of Paragraphs 5 and 6 and demand strict proof thereof.

SIXTH: They admit so much of Paragraph 7 as alleges that following the accident the Plaintiff was transported away from the accident by an ambulance; they lack information sufficient to form a belief as to the remaining allegations of said Paragraph and therefore deny the same and demand strict proof thereof.

SEVENTH: They lack information sufficient to form a belief as to the allegations of Paragraphs 8 and 9 and therefore deny the same and demand strict proof thereof.

EIGHTH: They deny the allegations of Paragraph 10 and demand strict proof thereof.

AS TO THE SECOND CAUSE OF ACTION

NINTH: Responding to Paragraph 11, the Defendants reaffirm and reallege their responses to the Paragraphs referred to in said Paragraph.

TENTH: They admit so much of Paragraph 12 as alleges the Defendant, Hanahan Motors, Inc., is a corporation incorporated under the laws of this state; they deny the remaining allegations of said Paragraph and demand strict proof thereof.

ELEVENTH: They admit the allegations of Paragraphs 13 and 14.

TWELFTH: They deny the allegations of Paragraph 15 and demand strict proof thereof.

THIRTEENTH: They are informed and believe Paragraph 16 alleges conclusions of law to which they are required neither to admit nor to deny.

FOURTEENTH: They deny the allegations of Paragraph 17 and demand strict proof thereof.

WHEREFORE, having fully responded to the Plaintiff's Complaint, the Defendants pray the same be dismissed with costs.

/s/ Thomas J. Keaveny
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803/722-1634

ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC
March 9th, 1988

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON CRYSTAL G. BROWN, Plaintiff, vs. JOHN DAVID McGEE and HANAHAN MOTORS, INC., Defendants.	IN THE COURT OF COMMON PLEAS Case No. 88-CP-10-730 CERTIFICATE OF MAILING

The undersigned, Attorneys for Defendants, hereby certify that on the 9th day of March, 1988, a copy of the attached Answer was placed in an envelope with first-

class postage, prepaid, and mailed to Kenneth W. Thornton, Jr., Esquire, Law Offices of Kenneth W. Thornton, Jr., P.A., Attorneys for Plaintiff, at their last known address, P.O. Box 1480, Georgetown, SC 29442.

/s/ Thomas J. Keaveny II
Thomas J. Keaveny, II
HOLMES & THOMSON
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803/722-1634

ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC
March 9th, 1988

APPENDIX F

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
Crystal G. Brown, Plaintiff, vs. John David McGee and Hanahan Motors, Inc., Defendants.	NINTH JUDICIAL CIRCUIT CASE NO.: 88-CP-10-730 NEGLIGENCE JURY TRIAL DEMANDED SUMMONS FOR RELIEF

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiffs' attorney, Kenneth W. Thornton, Jr., 716 Prince Street, Post Office Box 1480, Georgetown, South Carolina 29442, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

DATED at Georgetown, South Carolina, on this the 16th day of February, 1988.

LAW OFFICES OF KENNETH W. THORNTON, JR., P.A.
Attorneys for Plaintiffs

BY: /s/ Kenneth W. Thornton
Kenneth W. Thornton, Jr.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT
Crystal G. Brown,	)	OF COMMON PLEAS
Plaintiff,	)	NINTH JUDICIAL CIRCUIT
vs.	)	CASE NO.:
John David McGee and Hanahan Motors, Inc.,	)	NEGLIGENCE JURY TRIAL DEMANDED
Defendants.	)	COMPLAINT

The Plaintiff, complaining of the Defendants, would respectfully show unto this Court, and hereby alleges as follows:

FOR A FIRST CAUSE OF ACTION

1. That Plaintiff is a citizen and resident of Georgetown County, State of South Carolina, and the Defendant, John David McGee, is a citizen and resident of Berkeley County, State of South Carolina.

2. That the accident which gave rise to this cause of action occurred in the County of Charleston, State of South Carolina.

3. That at the time of the occurrence herein described, the Plaintiff was the driver of a 1985 Volkswagon Quantum, 4-door GL, bearing South Carolina License Tag No. JCL 816, which is owned by Crystal G. Brown, and the Defendant, John David McGee, was the driver of a 1982 2-door Buick sedan, bearing South Carolina License Tag No. XX43681, which is owned by Hanahan Motors, Inc.

4. That on or about April 4, 1987, at approximately 8:30 o'clock a.m., the Plaintiff was stopped in the left side through-lane on Route U.S. 17 North Bypass waiting for the red light to change when the Defendant, John David McGee, approached from the rear of Plaintiff's vehicle and struck Plaintiff's vehicle, which flipped end-over-end coming to rest on its roof. Defendant's vehicle was estimated in Uniform Traffic Collision Report as traveling at the rate of speed of 95 m.p.h.

5. That the time of the collision described above, the Defendant, John David McGee, was negligent, willful, wanton, careless, reckless, and grossly negligent in the following particulars; that at the time of the occurrence described above, the Defendant, John David McGee, was negligent, willful, wanton, careless, and grossly negligent in each of the following particulars:

a. In traveling along a public highway at an excessive rate of speed;

b. In traveling along a public highway at a rate of speed too fast for conditions;

c. In traveling along a public highway while under the influence of alcohol;

d. In failing to maintain a proper lookout for vehicles on the road ahead;

e. In failing to maintain a proper lookout for other vehicles, including the vehicle Plaintiff was driving;

f. In failing to have the vehicle in which the Defendant was driving under control and to reduce the speed of the vehicle to a reasonable and proper rate when approaching other vehicles;

g. In failing to have the vehicle which the Defendant was driving equipped with proper brakes, or, if so equipped, in failing to apply properly the brakes so as to avoid colliding with Plaintiff's vehicle;

h. In failing to maneuver the vehicle which Defendant was driving so as to avoid striking that of the Plaintiff;

i. In failing to sound his horn or otherwise warn the Plaintiff of the impending danger;

j. In driving in a grossly reckless manner without regard for the safety of others, including the Plaintiff;

k. In failing to use even a modicum of care or caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

l. In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

m. In acting in reckless disregard for the lives and safety of other persons using the highway, including the Plaintiff;

All of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff as are set forth more particularly below, said acts being in violation of the statute laws of the State of South Carolina.

6. That the Defendant, John David McGee, is responsible for the actions as heretofore set forth, which are the direct and proximate cause of the injuries and damages suffered by the Plaintiff.

7. That, as a result of the negligence, willfulness, carelessness, and gross negligence of the Defendant as set

forth above, the Plaintiff was transported to East Cooper Hospital by ambulance where Plaintiff underwent medical treatment and was hospitalized. Plaintiff suffered severe and painful injuries which were caused and, based on information and belief, will in the future cause Plaintiff to undergo additional and extensive medical care and treatment and which have caused, and, based on information and belief, will in the future cause Plaintiff to expend large sums of money for such medical treatment and related expenses, and which have caused and, based on information and belief, will in the future cause Plaintiff to suffer severe pain and suffering, mental anguish and emotional trauma, and which have caused and, based on information and belief, will in the future cause Plaintiff to lose money in the nature of wages and other income.

8. That, as a result of the negligence, willfulness, wantonness, carelessness, and gross negligence of the Defendant as set forth above, the Plaintiff was transported to East Cooper Hospital by ambulance, has been forced to receive medical care after returning home and has sustained severe, painful and permanent injuries which have caused and, upon information and belief, will in the future cause Plaintiff to expend substantial sums of money for medical treatment and related expenses and which have caused and, upon information and belief, will in the future cause Plaintiff severe pain and suffering, emotional stress and strain, and Plaintiff will suffer disfigurement as a result of these injuries.

9. That, Plaintiff, as a result of said injuries, has lost time from her employment and will, upon information and belief, miss time and work in the future, thereby losing income in the past and future.

10. That, because of the facts and circumstances set forth in the injuries and damages sustained by the Plaintiff, the Plaintiff is informed and believes that she is entitled to a judgment against Defendant for compensatory and exemplary damages, for costs in this action, and for such other and future relief as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION

11. The Plaintiff reaffirms and realleges all of the allegations contained hereinabove as set forth in the First Cause of Action.

12. That the Defendant, Hanahan Motors, Inc., is a corporation incorporated under the laws of the State of South Carolina, and doing substantial business in the County of Charleston, South Carolina.

13. That, upon information and belief, at the time of the occurrence herein mentioned, the Defendant, John David McGee, was operating the aforesaid 1982 2-door Buick sedan by, and with the permission, of the Defendant, Hanahan Motors, Inc.

14. That, upon information and belief, the aforesaid 1982 2-door Buick sedan is owned, furnished and maintained by the Defendant, Hanahan Motors, Inc., for the general use, pleasure and convenience of John David McGee, and that, at the time of the occurrence herein mentioned, the said vehicle is being used for such a purpose by the Defendant, John David McGee, who has general authority to do so.

15. That at the time of the collision described above, the Defendant, Hanahan Motors, Inc., was negligent, willful, wanton, careless, reckless, and grossly negligent in the following particulars; that at the time of the occurrence described above, the Defendant, John David McGee, the agent, servant, and/or employee of the Defendant, Hanahan Motors, Inc., was negligent, willful, wanton, careless, and grossly negligent in allowing the Defendant, John David McGee, to operate its vehicle in the aforementioned manner.

16. That the Defendant, Hanahan Motors, Inc., by and through its agents, servants and employees is responsible for the actions of the Defendant, John David McGee, as heretofore set forth, which are the direct and proximate cause of the injuries and damages sustained by the Plaintiff.

17. That, because of the facts and circumstances set forth in the injuries and damages sustained by the Plaintiff, the Plaintiff is informed and believes that she is entitled to judgment against the Defendant, Hanahan Motors, Inc., for compensatory and exemplary damages, for the costs of this action, and for such other and further relief as this Court may deem just and proper.

WHEREFORE, the Plaintiff prays for judgment against both Defendants for compensatory and exemplary damages, for the costs of this action, and in such other and further relief as this Court may deem just and proper.

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Supreme Court, U.S.
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No. 90-1474

In The

Supreme Court of the United States

October Term, 1990

JOHN DAVID McGEE and HANAHAN MOTORS, INC.,

Petitioners,

v.

CRYSTAL G. BROWN,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION

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No. 90-1474

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JOHN DAVID McGEE and HANAHAN MOTORS, INC.,

Petitioners,

v.

CRYSTAL G. BROWN,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In February 1988 the Plaintiff filed this tort action in the Court of Common Pleas, Charleston County, South Carolina. She sought actual and punitive damages for personal injuries she sustained in an automobile collision which occurred in Charleston County, on April 4, 1987 (see Petitioners' Appendix F). The Defendants filed a qualified general denial (see Petitioners' Appendix E).

On March 28, 1989 the case was called to trial. At that time the Defendants moved to strike Plaintiff's prayer for punitive damages on the basis that punitive damages are

an unconstitutional violation of due process (see Petitioners' Appendix C). That motion was denied (see Petitioners' Appendix C). On March 30, 1989 the jury returned a verdict for actual damages in the amount of sixty-seven thousand five hundred (67,500) dollars and awarded punitive damages in the amount of one hundred thousand (100,000) dollars (see Petitioners' Appendix B).

Defendants thereafter moved for judgement NOV as to punitive damages without elaborating the reasons therefor (see Petitioners' Appendix C). A timely appeal was then filed in the South Carolina Supreme Court on the grounds that (1) the lower Court erred in several evidentiary rulings, and (2) punitive damages violate the due process clause of the United States Constitution (see Petitioners' Appendix D and Respondent's Appendix B). By *per curiam* memorandum opinion filed December 20, 1990 the South Carolina Supreme Court affirmed the trial court, citing authority that an objection must be sufficiently specific to bring into focus the precise nature of the alleged error (see Petitioners' Appendix A).

SUMMARY OF ARGUMENT

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS SUPPORTED BY ADEQUATE STATE PROCEDURAL GROUNDS, WHICH BARS FURTHER REVIEW IN THE UNITED STATES SUPREME COURT: NO FEDERAL QUESTION DECIDED

In the trial court the Defendants lodged a non-specific objection to the constitutionality of punitive damages *per se* (see Petitioners' Appendix C). The Defendants did not make any reference to the State's procedures for awarding punitive damages. The trial court refused to

rule that punitive damages awards are unconstitutional (see Petitioners' Appendix C). By way of exceptions on appeal to the South Carolina Supreme Court the Defendants again alleged without specification that punitive damages violate the due process clause of the United States Constitution. None of the Defendants' exceptions on appeal specified any objections to the South Carolina procedure for awarding punitive damages (see Respondent's Appendix B). The Defendants argued for the first time in their brief on appeal to the South Carolina Supreme Court that South Carolina's procedure for awarding punitive damages was unconstitutional (see Petitioners' Appendix D). The South Carolina Supreme Court affirmed the trial court on the State procedural grounds that an objection must be sufficiently specific to bring into focus the precise nature of the alleged error (see Petitioners' Appendix A). The South Carolina Supreme Court did not decide the federal questions of whether punitive damages or the South Carolina procedure for awarding punitive damages violates the due process clause of the United State Constitution (see Petitioners' Appendix A).

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

In their statement of the case the Petitioners repeatedly assert that in the lower court they moved to strike Plaintiff's prayer for punitive damages on the basis that South Carolina's procedures for awarding punitive damages violate the due process clause of the United States Constitution, and that on this same ground appeal was taken to the South Carolina Supreme Court. In fact, in the

trial court, and by way of exceptions to the South Carolina Supreme Court, the Petitioners raised only the general question of the constitutionality of punitive damage awards, *per se* (see Petitioners' Appendix C, App. 6 and Respondent's Appendix B); the question of the constitutionality of South Carolina's procedures for awarding punitive damages was raised for the first time in the Petitioners' brief on appeal to the South Carolina Supreme Court (see Petitioners' Appendix D, App. 26). The South Carolina Supreme Court affirmed the trial court on the grounds that the Petitioners' objection was not specific enough to bring into focus the precise nature of the alleged error.

It is a well-settled matter of procedural law in South Carolina that an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. *Broom v. Southeastern Highway Contracting Company, Inc.*, 291 S.C. 93, 352 S.E.2nd 302 (Ct.App.1986). In *Broom* counsel objected to a request to charge the jury on the grounds that the charge was not a proper statement of the law. Counsel did not explain to the trial judge the specific problem or problems counsel had with the charge. The South Carolina Supreme Court held that the objection that the request was not "a proper statement of law" without specifying why it was not so was too general to be considered on appeal. In the present case counsel for the Petitioners summarily moved to strike punitive damages on the grounds that punitive damages are "unconstitutional, in violation of due process" (see Petitioners' Appendix C, App. 6). Counsel did not specify why punitive damages are an unconstitutional violation of due

process, nor did counsel make any argument concerning South Carolina's procedures for awarding punitive damages. The South Carolina Supreme Court properly applied the case of *Broom v. South Eastern Highway Contracting Company, Inc., supra,* and affirmed the trial court on State procedural grounds without reaching the federal question Petitioners allegedly raised.

In order to preserve an issue on appeal in South Carolina not only must a sufficiently specific objection be raised in the trial court but the objection must be properly presented as an exception in the South Carolina Supreme Court. *Murphy v. Hagan,* 275 S.C. 334, 271 S.E.2nd 311 (1980); *Priester v. Brabham,* 230 S.C. 201, 95 S.E.2nd 167 (1956); *Peoples National Bank of Greenville v. Manos Brothers, Inc.,* 226 S.C. 257, 84 S.E.2nd 857 (1955); *Kneece v. Kneece,* 296 S.C. 28, 370 S.E.2nd 288 (Ct.App.1988); *Crocker v. Barr,* 295 S.C. 195, 367 S.E.2nd 471 (Ct.App.1988). Exceptions must be phrased so as to present some distinct principle of law which appellant claims to have been violated, to point out some specific error complained of, and to present it in such form and manner that the point at issue may be readily recognized and properly reviewed. S.C. SUP. CT. R.4, § 6; *Odom v. Florence County,* 258 S.C. 480, 189 S.E.2nd 293 (1972). The South Carolina Supreme Court will not consider exceptions which are general, vague and indefinite.

S.C. SUP. CT. R.4, § 6; *Rowe v. Frick,* 250 S.C. 499, 159 S.E.2nd 47 (1968). An issue will not be considered on appeal where it is argued in appellant's brief but not supported by an exception. *Reid v. Hardware Mutual Insurance Company of Carolinas,* 252 S.C. 339, 166 S.E.2nd 317 (1969); *Kolb v. Nash,* 245 S.C. 25, 138 S.E.2nd 417 (1964);

Hudson v. Hudson, 294 S.C. 166, 363 S.E.2nd 387 (Ct.App.1987). In this case, the South Carolina Supreme Court ruled that the Petitioners' objection was not specific enough in the first instance, in the trial court. However a review of the record shows that the South Carolina Supreme Court could also have ruled that the Petitioners' exception was too general, vague and indefinite to be considered. Further the South Carolina Supreme Court could have ruled that the issue of the constitutionality of South Carolina's procedures for awarding punitive damages could not be considered on appeal where it was argued in the appellants' brief but not supported by an exception which merely raised the constitutionality of punitive damages *per se*. Thus, there were several adequate and independent State procedural grounds upon which the State court decision might have rested in addition to the grounds cited by the court.[1]

---

[1] The South Carolina Supreme Court Rules were in effect when this case was tried, appealed by notice of intent to appeal, briefed and docketed. The Supreme Court Rules were repealed and replaced by the South Carolina Appellate Court Rules (SCACR) effective September 1, 1990. This case was heard and decided after the effective date of the SCACR. However, Rule 102, SCACR provides that where notice of intent to appeal was served before the effective date of SCACR, the appeal shall proceed to conclusion under the Supreme Court Rules. Interestingly, exceptions are no longer required under SCACR, however, Rule 207 (b)(1)(ii) requires the Appellant's brief to contain a concise and direct statement of issues on appeal, and further cautions that ordinarily, no point will be considered which is not set forth in the statement of issues on appeal. Thus, the requirement of specificity in issues raised appears to remain intact in state appellate procedure.

(Continued on following page)

The Petitioners argue in a footnote that specificity is not relevant because a more specific objection would not have yielded a different result in the trial court. That has no bearing upon the issue of whether this Court should grant certiorari. What is significant is that a more specific objection may have yielded a different result in the State appellate court because it might then have had a basis to rule on a federal question. The lack of specificity in the trial court precluded review of the federal question by the State appellate court, and consequently precludes review by this Court.

In order for a State court case to be reviewed in the United States Supreme Court it must appear from the record that a federal question was decided by the State court. The record must show expressly or by necessary implication that a federal question was adequately presented in the state system and actually decided by the State courts adversely to the petitioner in the United States Supreme Court. *Webb v. Webb*, 451 U.S. 493 (1981). It is a well settled doctrine that the United States Supreme Court will decline to review a decision of a State court which rests upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226 (1964). The judgment of a state Court which is supported by adequate state procedural grounds will bar review by the United State Supreme Court. *Henry v. Mississippi*, 379 U.S.

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Moreover, the requirement of specificity for trial court objections, the actual state procedural ground upon which the state appellate court rejected this appeal, is in no way affected by the adoption of the SCACR.

443 (1965), reh. den. 380 U.S. 926 (1965). The failure to preserve an issue for appeal such as by properly making exceptions or assigning objections constitutes adequate state procedural grounds which result in a waiver of a federal question and bar review by the United States Supreme Court, *Herndon v. Georgia*, 295 U.S. 441 (1935). As the record indicates in this matter the South Carolina Supreme Court has not decided a federal question. This Court should therefore decline to review this case.

If this Court were to determine that a federal question is properly presented, the recent case of *Pacific Mutual Life Insurance Company v. Haslip*, 59 U.S.L.W. 4157 (U.S. March 4, 1991) (Number 89-1279) would be controlling. In *Haslip* this Court stated that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be *per se* unconstitutional, and held that the punitive damages assessed in *Haslip* did not violate due process since the award did not lack objective criteria and had the benefit of the full panoply of procedural protections.

CONCLUSION

The record in this case clearly shows that a federal question was neither adequately presented in the state system, nor actually decided by the state courts. Under state procedural law, the Petitioners' failed to make a sufficiently specific objection to punitive damages in the trial court and sufficiently specific exception on appeal to the State's highest court. The ruling by the South Carolina

Supreme Court on adequate and independent State procedural grounds precludes review by this Court; no federal question is preserved.

Should this Court determine that a federal question is properly before this Court, *Haslip, supra,* would be dispositive of the issue raised by Petitioners below. There has been no constitutional deprivation of due process in this award of punitive damages.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

JURY CHARGES ON PUNITIVE DAMAGES

Additionally, the Defendants deny that the Defendant McGee acted recklessness, [sic] wilfully and wantonly, and that there was any recklessness – that any recklessness was a proximate cause of injury to the Plaintiff.

So you will have to make decisions with regard to those issues.

Should you decide that the Plaintiff is entitled to a verdict, your next step would be to decide how much money the Defendant should be required to pay. We call such an award damages.

Damages are divided into two categories, actual damages and punitive damages.

Actual damages are intended to compensate injured parties. That is, to put that party as nearly as possible back in the same position that they were in before the incident occurred.

In other words, actual damages would be the actual losses or expenses which Plaintiff has suffered because of the Defendant's actions.

Punitive damages, as the name implies, are awarded to punish a Defendant or to deter a Defendant and others from similar conduct in the future; that is, to make an example of the Defendant.

Punitive damages are sometimes called exemplary damages. I will discuss punitive damages with you in more detail in a minute.

First, let me tell you a little more about actual damages.

* * *

As I told you earlier, punitive damages are awarded to punish the wrongdoer, to deter the wrongdoer or persons from similar conduct, and to make an example of the Defendant.

They are also to vindicate a private right of the Plaintiff.

What would justify an award of punitive damages? Well, before you can award punitive damages, you must first have found that the Plaintiff was entitled to actual damages.

You cannot award punitive damages if you do not award actual damages.

It would be necessary for the Plaintiff to prove that the Defendant was more than merely negligent. The evidence must show that the Defendant was reckless, wilful or wanton and was acting with a conscious failure to exercise reasonable care.

If you find that the Plaintiff is entitled to punitive damages, you should include such damages in your verdict and award the amount that you consider reasonable and proper in light of the circumstances which surround the case.

When under proper allegations the Plaintiff proves a wilful, wanton, reckless, malicious violation of his rights, it is not only the right but the duty of the jury to award punitive damages.

The amount of punitive damages is determined by the character of the wrong which is committed, the punishment which should be applied, and the party's ability to pay.

* * *

THE COURT: Mr. Foreman and ladies and gentlemen of the jury, we have three questions from you, I believe.

One is, are we allowed to ask if the damages we award, if any, are going to be paid by the insurance company.

Two, if so, are punitive damages, if any, covered under liability.

* * *

But the ability of a Defendant to pay actual damages is not a consideration. However, the ability of the Defendant to pay punitive damages is a consideration, and for that reason you may consider the evidence that has been presented with regard to the net worth of the Defendants which by stipulation between Plaintiff and the Defendants is Three Hundred Fifty Thousand Dollars.

That is something you may take into consideration along with the other factors which I earlier described to you, the character of the wrong committed and the punishment which should be applied.

So to go back over it, don't consider whether or not there is insurance. Secondly, with regard to any award of actual damages, if you find such an award is proper, and as to the amount, do not consider a Defendant's ability to

pay but a Defendant's ability to pay may be considered by you in connection with any award, if you find one to be proper, with regard to punitive damages.

APPENDIX B

VIII. The trial court erred in denying the Defendants' Motion to Strike punitive damages. Punitive damages violate the equal protection and due process clauses of the United States Constitution and the Constitution of the State of South Carolina.

IX. The trial court erred in denying the Defendants' Motion for JNOV, New Trial, New Trial NISI, and Remittitur. The jury verdict was not supported by the evidence and was the result of passion, prejudice and caprice.